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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

HL4

FILE: [REDACTED] Office: VERMONT SERVICE CENTER

Date: SEP 17 2008

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after  
Deportation or Removal under Section 212(a)(9)(A) of the Immigration and  
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application for permission to reapply for admission after removal was denied by the Acting Director, Vermont Service Center. A subsequent untimely appeal was accepted by the Director as a motion to reopen and was denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

It is noted that the applicant, through counsel, requested a 30-day extension to submit a brief and/or evidence to the AAO, but nothing was submitted within 30-days. *Form I-290B*, filed August 21, 2006. On September 25, 2007, in response to a facsimile from the AAO, counsel submitted additional evidence of the relationship between the applicant and his wife. The record is considered complete.

The applicant is a native and citizen of Guatemala who entered the United States without inspection on March 8, 1990. On March 10, 1990, an Order to Show Cause (OSC) was issued against the applicant. On May 16, 1990, an immigration judge ordered the applicant deported *in absentia* from the United States. On the same day, a Warrant of Deportation (Form I-205) was issued. On May 30, 1997, the applicant's wife, a lawful permanent resident of the United States at that time, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On September 16, 1999, the applicant's Form I-130 was approved. On September 29, 1999, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On November 12, 2003, the applicant departed the United States. On June 14, 2004, the applicant, through counsel, filed a motion to reopen the immigration judge's decision. On February 25, 2005, an immigration judge denied the applicant's motion to reopen. On February 28, 2005, the applicant's wife, a naturalized United States citizen, filed another Form I-130 on behalf of the applicant. On March 29, 2005, another Form I-205 was issued. The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside with his naturalized United States citizen wife.

The Acting Director determined that the applicant is inadmissible pursuant to section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), for being ordered removed from the United States, that the unfavorable factors in the applicant's case outweighed the favorable factors, and she denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Acting Director's Decision*, dated February 8, 2006. On March 27, 2006, the applicant filed an untimely appeal of the Form I-212 decision. The Director accepted the untimely appeal as a motion to reopen, and on July 21, 2006, the motion to reopen was denied.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

(ii) Other aliens.- Any alien not described in clause (i) who-

- (I) has been ordered removed under section 240 or any other provision of law, or
  - (II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.
- (iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, the applicant states that he disagrees with the Director's denial of his application and claims that he has numerous favorable factors in his case. *Form I-290B Statement*, filed August 21, 2006. The applicant claims that he has family ties, a *bona fide* relationship with his wife, no criminal record, he pays his taxes, and he is involved in the community. *Id.* The AAO notes that the applicant provided numerous photos of his wife and family, two newspaper photos of the applicant and other soccer officials, and six letters of recommendations from friends. Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), the AAO notes that section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must be met. An applicant for permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied. The AAO will consider the hardship to the applicant's wife, but it will be just one of the determining factors. In regards to the applicant's unlawful entry, the applicant states he should not be "held accountable for decisions" he made as a minor. *Id.* Additionally, the applicant claims that he did not know he was ordered deported *in absentia*. The AAO notes that on March 10, 1990, after the applicant was apprehended by the Immigration Service, he was served with the OSC. Additionally, on July 31, 2003, the Service sent the applicant a "bag-and-baggage" letter which notified the applicant to turn himself in to be removed from the United States on August 25, 2003. The AAO notes that the applicant failed to turn himself in to the Service and did not depart the United States until November 12, 2003. However, the AAO notes that the applicant voluntarily departed the United

States at his own expense. The applicant states that he “worked hard, paid [his] taxes and with the sole exception of the EWI, did not violate any laws of this great country.” *Id.* The AAO notes that the applicant has worked without authorization and that is an unfavorable factor. The applicant states that he has resided in the United States for thirteen years and he has been miserable without his wife. *Id.* The AAO notes that all the time that the applicant resided in the United States, he did so without authorization and that is an unfavorable factor.

The record of proceedings reveals that on May 16, 1990, an immigration judge ordered the applicant deported *in absentia* from the United States. On November 12, 2003, the applicant departed the United States. Based on the applicant’s previous order of deportation, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii)(I) of the Act.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant’s moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien’s acts and could encourage others to enter the United States to work unlawfully. *Id.*

Where an applicant is seeking discretionary relief from removal or deportation and the courts are required to weigh favorable equities or factors against unfavorable factors, many have repeatedly upheld the general principal that less weight is given to equities acquired by an alien after an order of deportation or removal has been issued. The AAO notes that the applicant’s Form I-212 involves a similar weighing of equities or favorable factors against unfavorable factors in order to determine whether to grant discretionary relief.

In *Garcia-Lopez v. INS*, 923 F.2d 72 (7<sup>th</sup> Cir. 1991), for example, the Seventh Circuit Court of Appeals (Seventh Circuit) reviewed a Board of Immigration Appeals (Board) denial of an alien’s request for discretionary voluntary departure relief. The Seventh Circuit found that the Board’s denial rested on discretionary grounds, and that the Board had weighed all of the favorable and unfavorable factors and stated the reasons for its denial of relief. The Seventh Circuit affirmed the general principle that less weight may be accorded to equities acquired after an order of deportation is issued, and the Seventh Circuit concluded that the Board had not abused or exercised its discretion in an arbitrary or capricious manner.

In *Bothyo v. Moyer*, 772 F.2d 353, 357 (7<sup>th</sup> Cir. 1985), the Seventh Circuit reviewed a discretionary stay of deportation case that weighed and balanced favorable and unfavorable factors. The Seventh Circuit stated that an alien's marriage to a lawful permanent resident did not necessitate the granting of a stay of deportation because the marriage occurred after deportation proceedings had commenced and after an Order to Show Cause had been issued against the alien. The Seventh Circuit then affirmed the general principle that an "after-acquired equity" need not be accorded great weight by a district director in his or her consideration of discretionary weight.

In *Carnalla-Munoz v. INS*, 627 F.2d 1004, 1006 (9<sup>th</sup> Cir. 1980), the Ninth Circuit Court of Appeals (Ninth Circuit) reviewed a discretionary suspension of deportation case. The Ninth Circuit affirmed the principle that post-deportation equities are entitled to less weight in determining hardship. In doing so, the Ninth Circuit referred to the 1980 decision, *Wang v. INS*, 622 F.2d 1341, 1346 (9<sup>th</sup> Cir. 1980) (overruled on unrelated grounds). In *Wang*, the alien sought discretionary relief and a finding of extreme hardship through a motion to reopen deportation proceedings. The Ninth Circuit held in *Wang*, that "[e]quities arising when the alien knows he is in this country illegally, e.g. after a deportation order is issued, are entitled to less weight than equities arising when the alien is legally in this country."

In *Ghassan v. INS*, 972 F.2d 631, 634-35 (5<sup>th</sup> Cir. 1992), the Fifth Circuit Court of Appeals (Fifth Circuit) reviewed a section 212(c) waiver of deportation discretionary relief case that involved the balancing of favorable and unfavorable factors. The Fifth Circuit found no abuse of discretion in the Board's weighing of equitable factors against unfavorable factors in the alien's case, and the Fifth Circuit affirmed the principle that as an equity factor, it is not an abuse of discretion to accord diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien spouse's possible deportation.

The AAO finds that the above-cited precedent legal decisions establish the general principle that "after-acquired equities" are accorded less weight for purposes of assessing hardship to a spouse and for purposes of assessing favorable equities in the exercise of discretion.

The favorable factors in this matter are the applicant's family ties to his United States citizen wife, general hardship she may experience, approval of a petition for alien relative, steady work record, history of paying taxes, letters of recommendations, lack of any criminal record, and no other grounds of inadmissibility. The AAO notes that the applicant's marriage to his wife occurred on March 26, 1997, which was after his order of deportation, and is an after-acquired equity. As an after-acquired equity this factor will be given less weight.

The AAO finds that the unfavorable factors in this case include the applicant's initial entry without inspection, his failure to abide by an order of deportation, and periods of unauthorized presence<sup>1</sup> and employment.

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<sup>1</sup> The AAO notes that the applicant's initial entry without inspection would usually be an unfavorable factor. Because the applicant was a minor when he entered the United States, this factor will be given less weight.

While the applicant's actions cannot be condoned, the AAO finds that given all the circumstances of the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

**ORDER:** The appeal is sustained and the application approved.